

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

LARRY ALLEN POWELL,

Petitioner,

v.

DONALD HOLBROOK,

Respondent.

NO: 2:14-CV-0377-SMJ

**ORDER ADOPTING REPORT AND
RECOMMENDATION,
DISMISSING PETITION AS
UNTIMELY AND DENYING
PENDING MOTIONS**

Before the Court is Petitioner's Objection, ECF No. 9, to the Report and Recommendation to dismiss his petition as untimely under 28 U.S.C. § 2244(d), ECF No. 8. Petitioner, a prisoner at the Washington State Penitentiary, is proceeding *pro se* and has paid the filing fee; Respondent has not been served.

Petitioner contends that when he filed his Personal Restraint Petition on January 30, 2014, he still had 6 days in which to file a collateral attack in State Court. Petitioner presents no facts showing that the Magistrate Judge's calculation that the federal limitations period under 28 U.S.C. § 2244(d)(1)(A), commenced on January 17, 2013, was in error.

ORDER ADOPTING REPORT AND RECOMMENDATION, DISMISSING
PETITION AS UNTIMELY AND DENYING PENDING MOTIONS -- 1

1 Once again, "it is the decision of the state appellate court, rather than the
2 ministerial act of entry of the mandate, that signals the conclusion of review." *See*
3 *Wixom v. Washington*, 264 F.3d 894, 897-98 (9th Cir. 2001). Petitioner's reliance on
4 the mandate issued on February 6, 2013, which granted him one year to file a
5 collateral attack in state court, did not also delay the commencement of the federal
6 limitations period.

7 The Court of Appeals of the State of Washington, Division III, affirmed Mr.
8 Powell's convictions and sentence on December 18, 2012. He did not seek further
9 appellate review to the Washington State Supreme Court within the allotted thirty day
10 time frame. See RAP 13.4(a), Washington Rules of Appellate Procedure. Petitioner
11 presented no statutory basis to delay the onset of the federal limitations period under
12 28 U.S.C. § 2244(d)(1)(B)-(D). Therefore, the federal limitations period commenced
13 on January 17, 2013, and expired on January 17, 2014. *Patterson v. Stewart*, 251
14 F.3d 1243, 1246 (9th Cir. 2001).

15 Again, although the federal limitations period is tolled during the period in
16 which a properly filed application for state post-conviction relief is pending, 28
17 U.S.C. § 2244(d)(2); *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999), Petitioner
18 did not file a Personal Restraint Petition until January 30, 2014, which was nearly
19 two weeks after the federal limitations period had already expired. "[S]ection
20


2244(d) does not permit the reinitiation of the limitations period that has ended before the state petition was filed.” *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003).

Accordingly, **IT HEREBY IS ORDERED:**

1. The Report and Recommendation, **ECF No. 8**, is **ADOPTED in its entirety**.
2. The Petition, signed on November 14, 2014, **ECF No. 3**, is **DISMISSED with prejudice** as untimely under 28 U.S.C. § 2244(d).
3. All pending motions are **DENIED** as moot.

IT IS SO ORDERED. The District Court Executive shall enter this Order, enter judgment, forward a copy to Petitioner and close the file. The Court further certifies that pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

DATED this 29th day of April 2015.



SALVADOR MENDOZA, JR.
United States District Judge